williams appeal, 73 Pa. 249

LEGAL GAZETTE. May 23, 1873.

Supreme Court of Pennsylv'a.

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PHILADELPHIA LIBRARY COMPANY v. HENRY J. WILLIAMS.

1. The taking by a court from the hands of a testamentary trustee, the execution of a power submitted to his sole discretion, would violate the right of private property and the spirit and purpose of the bill of rights, and could not be justified except upon the clearest evidence of his fraud or incapacity.

2 To hold that by reason of his promise to the testator, the mind of a trustee of admitted integrity, was under a constraint of which he was unconscious, and which made him incapable of exercising his judgment, notwithstanding he swears that he did act upon his own judgment, and because it accorded with his promise, would be to deny the power of self-knowledge and the capability of self-examination, upon which rests the doctrine of man's accountability for his thoughts and purposes.

3. Though a verbal direction of a testator in conflict with a power contained in his will, cannot alter the written terms of the power, yet a court of equity may compel a trustee to comply with a promise to follow a verbal direction and act of the testator, in the line of the power.

4. A chancellor will so control a trustee that he shall not disappoint the true intent and purpose of the donor, as gathered from the instrument containing the power; and an innocent motive will not save the exercise of the power if it violate the true purpose of the trust: broader than this there can be no conception of chancery power in Pennsylvania.

5. By the terms of a will, a trustee was to act under a broad and thoughtful foresight in the selection of a lot whereon to erect a building for a public library. The testator prior to his death, engaged the trustee upon his solemn promise to select a certain lot. The trustee, a man of admitted integrity, did select that lot. Upon a bill in equity filed against him, he both in his answer and whilst under examination, declared that he selected the lot because he thought it the best for the purpose that could be obtained, and assigned good reasons therefor. *Held*, that he had properly exercised the power.

Certificate from Nisi Prius.

Opinion by AGNEW, J. Delivered May 19th, 1873.

This is not an ordinary proceeding. It is an endeavor to set aside a man's solemn act, done in the exercise of his right of property, in his life-time, when he had ab-

solute power over his own estate. It is an effort also to declare his friend, the chosen agent to execute his purpose, invested with absolute discretion to this end, disqualified to perform his will, because at his earnest request this friend has adopted and followed the testator's act. As a consequence, the bill seeks, on the ground of entire disqualification, to take the actual execution of the will into the hands of the court, and to declare how much of the *corpus* of the estate shall be used for that purpose. As a further consequence, the will must be executed by a stranger—a master acting under decrees procured from time to time by plaintiffs; for, by the total disqualification of the executor, the testator is no longer represented. This is the frame and purpose of this bill. Such a proceeding violates the right of private property and the spirit and purpose of the bill of rights, and cannot be justified except upon the clearest evidence of the incapacity of the executor, or that he is acting in fraud of his powers.

The case, briefly stated, is this: Dr. Jas. Rush, a gentleman of education and fortune, though somewhat peculiar, conceived the thought of founding a noble charity, at once a public benefit to his native city, Philadelphia, and a monument to those from whom he derived his wealth. He pondered on the subject and then made his will. At first he restricted the site of the building to certain central limits; but the rapid progress of the city during the eventful period of 1860 to 1867, altered his views of location. Fearful, if his charities were placed near the centre of the city, where property was rising rapidly, that the building might be swept away by the tide of speculation, he made a codicil, revoked the restriction, and enabled his executor to go beyond the limits stated in his will. Still reflecting upon his scheme for about two years more, and anxious to locate his charity to suit his own thoughts, he had careful examinations made by his friend and executor, and finding no other site suitable, either from price or size, he finally chose a spacious

square on the great central avenue of the city, a few squares south of the original limit, and bought it at a cost of $130,000, or about one eighth of his entire estate. Upon this ground he directed his executor to build, and, to secure his co-operation, obtained his promise to do so. This promise was given, the executor swears most positively, not only out of regard to the testator's wishes, but because the lot and site were approved by his own judgment, founded on a previous examination of all the known eligible sites. Within a month after the death of Dr. Rush, Henry J. Williams, the executor, consulted eminent counsel as to the obligation of the contract of purchase upon the estate and upon his own duties in making the selection, and was advised by Judge Strong that the purchase was binding, that his power of selection was absolute, and was to be exercised upon his own judgment.

Dr. Rush died on the 26th of May, 1869. Mr. Williams made the selection under the will, and communicated it to the library company on the 29th of June, 1869, having previously stated it to individual members. Mr. Williams, the executor, a member himself of the library company, having no selfish or hostile interest, an old and skilful lawyer, well informed of his duties, a gentleman of intelligence and refinement, one whose integrity and purity of character are conceded by the plaintiffs to the fullest extent, is admitted to have acted in perfect good faith, and he, on his oath, attests that he acted upon his own judgment. It is alleged that the selection of the site at Broad and Christian streets, chosen and purchased by the testator, and adopted by the executor, must be set aside, not because of any intent to disappoint the trust, or of the slightest *mala fides*, but because the mind of the trustee, was, by reason of a promise to the testator, under a constraint, of which he was unconscious, when he made the selection, which made him incapable of exercising his judgment, notwithstanding he swears that he did act upon his own judgment,

and because it accorded with his promise. The proposition, instead of being so plain and clearly established that a court of equity can act upon it to set aside the testator's choice and oust his trustee, is simply incredible, and is destructive of the right of private property. It denies the power of self-knowledge and the capability of self-examination, upon which the doctrine of accountability for the thoughts and purposes of the heart rests. It asserts a want of power to introspect our consciousness and motives of action under the responsibility of an oath, and our ability to distinguish between the obligation of a promise and the determination of the judgment in doing an act of importance pondered for weeks. The case is brought directly to this point, for the positive, distinct and reiterated assertions of Mr. Williams, in his answer and his testimony, that he did act upon his own judgment, compel us to decide either that he does not know the operations of his own mind, or that he is foresworn. The latter alternative is conceded on all hands to be untrue. Can it be possible that a court, in such a case and on such ground, will depose the executor, cast the property purchased by the testator back upon the estate, wrest the power from his hands, and place it in the hands of others? There is no such case to be found in the books here or elsewhere; and if any can be found abroad, it cannot be imported into this free State. Before examining the law let me state the bearing of the facts.

Was the selection in the line of Dr. Rush's written will? The will is dated in 1860. Dr. Rush devises to Mr. Williams all his estate, in trust, to select a lot not less than 150 feet square, between Fourth and Fifteenth, and Spruce and Race streets; and to erect a fire-proof building sufficiently large, not only for the present wants of the library company; but for future extension, according to his own plans and directions; and if he should have none, then according to Dr. Williams' best judgment and to the views he had confessed to him.

Thus, by the terms of the will, the testator reserved to himself the right to leave written instructions; and if he did not, that the executor should act upon his *verbal* directions. His verbal instructions to his executor are therefore within the very line of the written will. It is a matter of history that the war of the rebellion changed the whole surface of affairs in this city as well as elsewhere, by the inflation of the currency, the rise of prices, and increase of business.

These had a strong influence on Dr. Rush's mind. Let the language of the first codicil express his own thought. Paragraph 26—"Events and circumstances occurring within the last six years have obliged me to make several changes in my will." Then he proceeds to state the risk of making a new will, lest his death within thirty days afterwards might void it. "To void the possibility of such a result (he proceeds), I must let it stand as it is, and add other provisions as they may occur to me."

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The codicil is dated May 16th, 1866. No better exposition of the testator's thoughts can be made than thus given to us in his own words, to exhibit the state of his mind when he made the second codicil, of the 18th of April, 1867. Remembering this, the testator's change of views since 1860, when the original will was made, is clearly expressed in the language of the second codicil.

Sect. 2. "I have in my will *limited the* extent of the lot to be purchased for the library building, as *well as its localities*; but as I desire that it shall have not only strength, durability and accommodation, but also be of *sufficient magnitude for any future or contingent*, but not ambitious or competing increase of the library, *in order to prevent*, if possible, it being torn down in twenty years, *and the lot sold at a speculative profit to suit the hyperbole of the times.* I authorize and allow my executor under a broad and thoughtful foresight to *increase the size of the lot*, and select *any* situation *he may*

deem most expedient, *without regard to any* provisions of my will or codicils." I have italicized the language to bring out its meaning.

Now what was the testator's own idea as contained in this very provision (the power in question) of a *broad and thoughtful foresight?*

He tells us himself to *increase the size of the lot*, and to go out of the original limit to select *anywhere*. In a broad and thoughtful foresight he foresaw that the centre of the city would not suit his purpose or his means. He said to his executor, go out and choose elsewhere, so that the magnitude of the building will suit all future time, and that the edifice itself shall not be swept away by the irresistible tide of speculation, to suit, as he termed it, the hyperbole of the times; a figure to express the superlative fancy and spirit of an inordinate inflation of prices.) 6

In the next place, did the testator follow the line of his own thought, as expressed in the will itself? The proof of this is very clear, and is not contradicted. He made inquiries for eligible lots—new examinations made were both within the original limits and without. Mr. Williams himself explored, but found nothing suited to Dr. Rush's purpose. Finally, the lot at Broad and Christian streets presented itself, and here the testator found a site suited to his thought—a large, open square, on the main great avenue of the city, 299½ feet on Broad street, and running back 527 feet on Christian; contain-about three acres and a half; at a price of $130,000—a large sum, indeed, but still leaving enough, as he believed, to put up the extensive building which filled his thought, as expressed in the codicil itself. In view of the rapid extension of the city within the last thirteen years, what right have we to say this selection was not made under a broad and thoughtful foresight, and does not meet the views and purposes expressed in the written will and codicils? The views and wishes of the library committee are outside of the

true question, which must be decided upon the will itself.

Next, what were the grounds on which Mr. Williams exercised his discretion. These are best stated in his own words in his answer and sworn testimony.

"I have chosen this site for these, among other reasons:

"1. It is on the finest street of our city.

"2. It is, so far as I know, the only lot on that street sufficiently large for the building I must erect, which I can obtain at a reasonable cost.

"3. If compelled to purchase a lot elsewhere, I will not be able to erect the building ordered by the testator.

"4. I know of no suitable lot on any other street which can be had at the same cost.

"5. It is but a little distance from the centre of the city, and is within easy reach, by car, of all portions of it.

"6. It will not be necessary to have the library building torn down in twenty years, and the lot sold because of its limited dimensions.

"7. Its size insures for all time light, air, retirement, quiet, and safety from external dangers.

"8. It already belongs to the estate.

"9. It is exactly suited to the kind of library Dr. Rush proposed to endow—not a reading-room, nor one containing the light and ephemeral literature of the day, but one for readers and students of a higher grade.

"10. It will carry out the cardinal intent of the testator, as he understood it, because it is the one he selected himself.

"I adhere to this choice and to my determination to build thereon, notwithstanding the opposition which has been raised, because it was to my judgment, and not that of others, Dr. Rush confided the performance of his testamentary dispositions."

Certainly these are good reasons, and aside from all other evidence, vindicate Mr. Williams' assertion that he acted on his own judgment, for they are processes of thought, or steps which lead to his

conclusion. Now, let us see what he says on oath as to the exercise of his own judgment; and first in his answer in direct response to the bill: "I selected the Broad and Christian street lot when I had assumed the executorship, after calm, careful and deliberate consideration, having thought of it in every shape, favorable and unfavorable, in which it had been presented, because it was in my judgment, the best I could obtain for the object and purposes of Dr. Rush's will, and because it combined adequate dimensions with cheapness and position." In regard to his promise to Dr. Rush—the alleged ground of disqualification—after stating his efforts to find a suitable lot, he says: "It was after this that the promise stated in my letter of the 30th December, 1870, was made to him. This was given with a knowledge of almost every circumstance which lead subsequently to my decision, when, as his executor, it became my duty to determine the site of the library." Again: "I aver that at the time I made said promise I thought it the best lot for the purpose which could be obtained, and I aver that after careful reflection and subsequent examination I still entertain this opinion." There is much more in the answer to the same effect.

His testimony is given as strong as his answer. When asked whether his judgment was not influenced by his promise, he replied: "Not that I am conscious of at all. I believe if I had made no promise, and had not known the wishes of Dr. Rush, my judgment would have been the same." Again he said: "If my promise to Dr. Rush, and my oath as executor had been at all in conflict, I would have resigned my executorship at once, and left some other person to put up the building."

Much more he said to the point, but this will suffice to know the strong and positive convictions of his mind. In these assertions he is also strongly corroborated by the testimony of many witnesses as to what took place just before Dr. Rush's death, and the communication of the se-

lection of the lot to Mr. Wharton, Mr. Biddle and others. He consulted counsel, as proved by Judge Strong's letter of the 15th of June, 1869, before the meeting of the library company, on the 29th of June, when his selection was formally made known. A committee of conference was appointed at this meeting. To Mr. Fraley, one of the committee, who suggested other lots, he replied that they had all been examined, and that the prices were so high they did not suit Dr. Rush, and that the lot at Broad and Christian streets had been selected because, in the judgment of both Dr. Rush and *himself*, it combined all the advantages which he wished to secure. He again consulted Judge Strong, who replied July 19th, 1869, saying: "As executor, you are guided by the written will. In the exercise of the discretion reposed in you by that instrument, you may regard Dr. Rush's views and wishes orally expressed; but after all *your* judgment, however it may be made up, must be your guide in matters left to your discretion." Again urged by Mr. Fraley to change the selection on the 6th of August, 1869, he replied: "*I deem* that situation (the Broad and Christian lot) most expedient under all the circumstances of the case, for I *consider* its distance from the centre of the city as far outweighed by its other advantages, and I have the consolation of knowing that this decision is in entire accordance with the wishes of the testator, who selected and purchased this lot for this very purpose in his lifetime." The library company themselves knew he had exercised his own judgment in the matter. A meeting was called for the 19th of October, 1869, to vote on the acceptance or rejection of the provisions of Dr. Rush's will. Committees were raised *pro* and *con* to influence the opinions of the members when the meeting should take place, and circulars were issued.

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On one side it was said: "But the executor of Dr. Rush, both from the expressed wishes of the testator during his life, as

well as from *his own judgment of the suitableness* of the selected site, is indisposed to change it." The other side said : "The will gives to the executor the *absolute right* to select the location, and to construct the building, and *this discretion has been exercised* by selecting Broad and Christian streets as *the most suitable spot* in the city for the purpose." Against this overwhelming evidence, the positive oath of Mr. Williams, the contemporary circumstances, and the understanding of the library company, how can the conclusion be drawn that Mr. Williams did not exercise his own judgment ?

It was after all these things had occurred, and nineteen months after the death of Dr. Rush, the letter of December 30th, 1870, was written, the stronghold and fortress of the plaintiff's bill. The object and purpose of this letter are made obvious by the circumstances which have evoked it. Controversy had arisen, and the library company had made several efforts to induce Mr. Williams to revoke his selection, and finally, at a meeting of the company, on the 10th of December, 1870, resolutions were passed, one of which expressed the "earnest hope and *request* that Mr. Williams would *reconsider* his intention to build on the site chosen." Dr. Willing, Judge Hare and Mr. Lea, were appointed a committee to confer with Mr. Williams, and a correspondence ensued, in which Mr. Williams adhered to his selection. The letter of December 30th, 1870, was then written, at the invitation of Dr. Willing, as a *formal* expression of Mr. Williams' intentions. He restates his convictions, and expresses his surprise that he should be again asked to change his intentions, and proceeds to defend himself against censure for refusing to change his mind. Then he pleads the sacred character of his promise. He cannot yield his judgment, but pressed hard to do so, he appeals to the well known sensibility of the gentlemen composing the committee, to all honorable engagements, if the case were their own.

He repeats, also, what he has always said, that to change would be in opposition to *his own deliberate judgment;* and "*I mean this* (he adds) *in its fullest sense.*" This letter, written at the close of the year 1870, long after the controversy had existed, in defence of his motives and his reputation, evoked by the direct action of the library company, instead of proving that Mr. Williams acted without judgment, and from unconscious restraint, proves the convictions of a mind thoroughly convinced, and a heart that was fixed upon a just purpose. Admit that he was also influenced by his promise to his friend. So he ought to be, when, as he swears, it was an approving judgment. This is a proper influence, and does not show a man void of discretion, and so bound by conscience that his judgment is lost in the obligation of a foolish pledge.

How far, then, will a court of equity go in regarding a promise to a testator, as in fraud of his written will? Here I think the plaintiffs do not discriminate well. That a verbal direction of a testator in conflict with a power contained in his will, cannot alter the written terms of the power, is beyond contradiction, and to this extent this argument may fairly go.

But that a court of equity can pronounce the verbal direction, and, still stronger, the *act* of this testator, in the very line of his own power, and a promise to conform to it, *ipso facto*, a fraud on the power, is contrary to reason and the plainest principles of equity. The reverse is true, for it is the province of equity to follow the mind of the testator. So clear is this principle, that a court of equity will sometimes convert the devisee, even of an absolute estate into a trustee, in order to compel him to perform a solemn promise given to his testator to dispose of the property according to his verbal direction. In doing this the written will is struck down to reach the equity that lies in the verbal direction. Such was the case of Hoge v. Hoge, 1 Watts, 163, where the testator devised an estate to

his brother absolutely, under a verbal direction that it should be for the benefit of his illegitimate son. Chief Justice Gibson cites in his opinion a number of cases where the verbal direction was sustained against the text of the will—one, for instance, where a testator having devised his lands to a nephew, desired his heir-at-law not to disturb the nephew in possession of certain lands acquired after the execution of the will, and it was so decreed. Now if a court of equity, to prevent a fraud upon the testator's actual intention, will disregard the written text, how much more consonant to equity is it to regard the solemn act of a testator who has involved his estate in the obligation of a contract in the line of a will, and to carry out its very intent; and how can it regard the promise of the executor to follow the wishes of the testator in this respect, as *ipso facto*, a fraud upon the testator's power.

On what principle of sound reason, conscience, or equity can the selection of this lot by the executor be pronounced a fraud on the power, or a disappointment of the power, or as an undue and improper execution of the purpose of the testator as contained in his written will? How has the promise to the testator vitiated the selection? What provision of the will does it offend? How can we say the selection is not made with a broad and thoughtful foresight? On the contrary, it conforms both to the will and the purpose of the testator. In following the testator's own act of purchase, nothing but the clearest evidence of incapacity in the testator to select, or of folly in the selection, and of blind and unreasonable obedience in the executor, can set it aside. I am willing to concede the authority of all the cases cited for the plaintiff, including Duke of Portland's case. They may be summed up in a single view—that a chancellor will so control a trustee that he shall not disappoint the true intent and purpose of the donor, as gathered from the instrument containing the power. To execute

it otherwise is a fraud on the power. Hence, it is said, "he must execute it *bona fide for the end designed.*" It may be a corollary, also, that an innocent motive will not save the exercise of the power, if it violate the true purpose of the trust. Broader than this there can be no conception of chancery power in Pennsylvania, where the citizen is secured by the constitution in his rights of property. When a testator, to fulfil his own purpose, confers an absolute discretion as to his property, it is *his* right to have the boon executed by his own trustees; and no court can without clear and adequate cause displace the trustee without violating the right of property.

This is well expressed in the letter of advice of 15th June, 1869, from Judge Strong, under which Mr. Williams acted. "A court of equity does not interfere with a discretion reposed, except in cases of *clear* abuse, when the court *can* conclude that the donee of a power is *acting in fraud of it.* But when, as in your case, the trustee acts in accordance with his own best judgment, and in so doing, follows the positive directions of his testator, it would be altogether *unprecedented for a court to interfere and substitute* its discretion for that invoked by the will. In this statement he is most distinctly supported by two recent cases decided by this court. Pulpress v. African Church, 12 Wright, 204, and Nagle's Estate, 2 P. F. Smith, 154. To these may be added a few citations from elementary writers. In the recent work of Mr. Perry on Trusts, the modern decisions are brought up. On page 455, section 508, he says, when the discretion to be exercised is a matter of personal judgment—"the trustees alone can exercise these powers, and courts cannot generally interfere to control mere personal judgments in personal matters." For this, numerous cases are cited. Again, on page 457, section 511, —"If the trustees exercise their discretionary power in *good faith*, and without fraud or collusion, the court cannot re-

view or control their discretion." For this, twenty-four cases are cited. "Nor will a bill be entertained to compel the execution of a mere discretionary power." Ibid. Mr. Hill, in his work on Trustees, ed. 1846, p. 482, says, "as a court of equity will not, in general, assume the exercise of a discretionary power vested in trustees, so it will not interfere to control the trustees acting *bona fide* in the exercise of their discretion." He cites many cases for this statement.

In conclusion, there is no ground in fact or in law, on which the prayers of this bill can be supported.

The decree of the Court at Nisi Prius is, therefore, reversed, and the bill is ordered to be dismissed at the cost of the plaintiffs.

Read, C.J., and Mercur, J., dissenting.